



Paper No. 9

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OFFICE OF PETITIONS

In re Application of
Bernd Petzold et al.
Application No. 09/960,563
Filed: September 21, 2001
Attorney Docket No. 10191/2020

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: DECISION DISMISSING REQUEST
: FOR RECONSIDERATION
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This is a decision on the request for reconsideration filed May 29, 2002, again requesting that the above-identified application be accorded a filing date of September 12, 2001 under the provisions of 37 CFR 1.6(e).

A request that the above-identified application be accorded a filing date of September 12, 2001, was submitted with the application papers on filing. A decision dismissing the request was mailed on March 29, 2002. Thereafter, on May 29, 2002, the present request for reconsideration was filed.

37 CFR 1.6(e) states that:

If interruptions or emergencies in the United States Postal Service which have been so designated by the Commissioner occur, the Patent and Trademark Office will consider as filed on a particular date in the Office any correspondence which is:

- (1) Promptly filed after the ending of the designated interruption or emergency; and
- (2) Accompanied by a statement indicating that such correspondence would have been filed on that particular date if it were not for the designated interruption or emergency in the United States Postal Service.

35 U.S.C. 21(a) states that:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

In the previous decision, it was acknowledged that the U.S. Patent and Trademark Office (Office) designated the interruption in the service of the USPS in the borough of Manhattan as a postal service interruption and emergency within the meaning of 35 U.S.C. 21(a), with the provisions of 37 CFR 1.6(e) in effect, and also designated the interruption in the Express Mail service of the USPS as a postal service interruption within the meaning of 35 U.S.C. 21(a) and 37 CFR 1.6(e). See "United States Postal Service Interruptions", 1251 *Off. Gaz. Pat. Office* 55 (October 9, 2001).

In the request for reconsideration, applicants state that all three requirements set forth in 37 CFR 1.6(e) have been satisfied. It is agreed that the first two requirements (*i.e.*, an interruption or emergency in the United States Postal Service that has been designated by the Commissioner and the correspondence being promptly filed after the ending of the interruption or emergency) have been satisfied. Applicants assert that the third requirement was satisfied because the application was accompanied by the statement required by the rule, namely, that the application would have been filed on September 12, 2001, if it were not for the designated interruption or emergency in the United States Postal Service. In response to the statement made in the previous decision that the request did not allege any facts, applicants state that they did not allege any facts in the request because neither the statute nor the rule requires them to do so.

As stated in the prior decision, the statute requires that the correspondence being filed in the Office would have been deposited with the United States Postal Service (USPS) but for **postal service** interruptions or emergencies. Thus, the statute requires that (1) the application papers being filed must be complete and ready to be deposited with the USPS on the filing date requested by applicants, and (2) the complete application papers could not be deposited with the USPS for the sole reason that the postal service was not available due to the interruption or emergency designated by the Office.

The previous decision noted that the transmittal letter for the application was dated September 21, 2001, and stated that it did not appear that the application was prepared and ready to be deposited with the USPS on September 12, 2001. The request for reconsideration fails to address this issue. The fact that the applicants' attorney's office was inaccessible to the attorney on September 12, 2001, due to the World Trade Center attack and the attorney was diligent in filing the application papers once his office resumed its normal operations is not sufficient to establish that the application was ready to be deposited with the USPS on September 12, 2001. The record shows that the transmittal letter for the application was dated September 21, 2001. The Office simply cannot accept applicant's statement when the evidence contradicts the statement and applicants have not provided any explanation or additional evidence to show that the application papers were complete and ready to be deposited with the USPS on September 12, 2001.

Contrary to the assertion made in the request for reconsideration, the Office is not attempting to

require applicants to provide evidence proving that the interruption did exist. The Office is simply trying to ascertain whether the application is entitled under the statute, 35 U.S.C. 21(a), to a September 12, 2001 filing date. The statement in the previous decision cited by applicants in the request for reconsideration was made because an indication that the application was attempted to be deposited with the USPS by Express Mail service on September 12, 2001 and that the USPS refused to accept the correspondence or that the application was ready to be deposited with the USPS on September 12, 2001 but all post offices in the area were closed would support the statement that the application would have been filed on September 12, 2001, if it were not for the designated interruption or emergency in the United States Postal Service.

The previous decision has been reconsidered as requested. The result, however, is the same. The request to accord the application a filing date of September 12, 2001 is again dismissed.

Any further request for reconsideration should be filed within **TWO MONTHS** of this decision in order to be considered timely (see 37 CFR 1.181(f)) and should be addressed as follows:

By mail: U.S. Patent and Trademark Office
P.O. Box 2327
Mail Stop DAC
Arlington, VA 22202

OR

Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Office of Patent Legal Administration

By hand: Crystal Plaza Four, Suite 3C23
2201 South Clark Place
Arlington, VA

Applicant is cautioned, however, that any further request for reconsideration that fails to address the issue of why the transmittal letter is dated September 21, 2001, may be considered a failure to engage in reasonable efforts to conclude prosecution of the application under 37 CFR 1.704. See "Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term", Final Rule, 65 Fed. Reg. 56365, 56371 (Sept. 18, 2000).

The application is being forwarded to Technology Center 3600 for examination in due course.

Telephone inquiries specific to this matter should be directed to the undersigned at (703) 306-5586.

A handwritten signature in cursive script, reading "Eugenia A. Jones". The signature is written in black ink and is positioned above the printed name.

Eugenia A. Jones
Senior Legal Advisor
Office of Patent Legal Administration
Office of the Deputy Commissioner
for Patent Examination Policy